



BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE APPLICATION
OF ARIZONA PUBLIC SERVICE
COMPANY FOR A HEARING TO
DETERMINE THE FAIR VALUE OF THE
UTILITY PROPERTY OF THE
COMPANY FOR RATEMAKING
PURPOSES, TO FIX A JUST AND
REASONABLE RETURN THEREON, TO
APPROVE RATE SCHEDULES
DESIGNED TO DEVELOP SUCH
RETURN

DOCKET NO. E-01345A-16-0036

Arizona Corporation Commission

DOCKETED

JUN 15 2017

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2017 JUN 15 P 4:34

IN THE MATTER OF FUEL AND
PURCHASED POWER PROCUREMENT
AUDITS FOR ARIZONA PUBLIC
SERVICE COMPANY

DOCKET NO. E-01345A-16-0123

**OPPOSITION OF ARIZONA
PUBLIC SERVICE COMPANY
TO THE EMERGENCY
RENEWED MOTION OF
COMMISSIONER ROBERT
BURNS FOR RELIEF STAYING
THESE RATE-MAKING
PROCEEDINGS**

APS urges the Commission to deny The Emergency Renewed Motion of Commissioner Robert Burns for Relief Staying These Rate-making Proceedings ("Burns Motion to Stay").¹ APS filed its written objections to Commissioner Burns's subpoena more than eight and a half months ago. At that point, as the Superior Court recently held, it was up to Commissioner Burns to negotiate a resolution or to move to compel before this Commission. Yet, for eight and a half months, Commissioner Burns did neither. Now, at the eleventh hour—with the record closed and briefing complete

¹ APS is contemporaneously filing a separate opposition to Commissioner Burns's Emergency Motion to Compel Compliance With Investigatory Subpoenas.

1 on a proposed settlement of this case supported by over two dozen of the parties,
2 including Commission Staff and the Residential Utility Consumer Office—
3 Commissioner Burns urges the Commission to stay these proceedings.

4 There is no emergency, and the Commission should reject the motion for a stay
5 of the rate case. Commissioner Burns offers no explanation for the extensive delay in
6 filing his motion to compel, and a stay would severely prejudice APS and harm the
7 public interest.

8 **I. Commissioner Burns Seeks Relief that Violates Commission Rules.**

9 By statute, a public utility in Arizona is entitled to file for a change in its rates at
10 any time. A.R.S. § 40-250. The Commission may conduct a hearing on the proposed
11 change, but under Commission rule, the Commission's review must be complete within
12 360 days. A.A.C. R14-2-103(B)(11)(d). The time period prescribed by the
13 Commission's rules not only is good public policy for customers, but also ensures
14 fairness to regulated utilities. Because rate changes are prospective only, in the absence
15 of a timeline for decision, a utility could be forced to continue serving the public
16 indefinitely at rates that do not provide a fair return and could negatively impact its
17 ability to provide reliable service. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-
18 08 (1989) (noting that States may not force regulated utilities to serve the public at
19 unjustly low rates).

20 The Burns Motion to Stay must be evaluated against this backdrop. A stay
21 would prolong the rate case proceedings beyond the time period prescribed under the
22 Commission's rules, which is due to expire by August 1, 2017.

23 Delay beyond this date is permitted only in two circumstances: an "amendment
24 to a filing which changes the amount sought by the utility or substantially alters the
25 facts used as a basis for the requested change in rates or charges," or "[a]n
26 extraordinary event." A.A.C. R14-2-103(B)(11)(e).² Neither circumstance is present

27 ² Additionally, the time period "shall be extended three days for each one day of actual
28 hearing on the merits of the filing." A.A.C. R14-2-103(B)(11)(f).

1 here. APS has not amended its filings, and Commissioner Burns has not identified any
2 “extraordinary event” that would justify disregarding the timeline set forth in the rules.
3 He focuses only on APS’s objections to the subpoenas that Commissioner Burns issued
4 nearly ten months ago, as to which Commissioner Burns has never, until just days ago,
5 taken any of the required steps to enforce. No “event” has occurred in the interim
6 justifying a delay, much less an “extraordinary” one. The subpoenas were issued on
7 August 25, 2016. On September 9, 2016, APS timely objected in writing, thereby
8 suspending its obligation to comply. Ariz. R. Civ. P. 45(b)(5)(C). At that point, it was
9 up to Commissioner Burns to move to compel. *See Burns v. Ariz. Pub. Serv. Co.*, No.
10 CV 2017-001831 (Maricopa Cnty. Sup. Ct. May 26, 2017), Slip op. at 2. He waited
11 until June 2, 2017, a delay of almost 9 months, to do so. Commissioner Burns should
12 not be permitted to manufacture an “extraordinary event” out of his own prolonged
13 inaction. The Commission should deny the motion because it requests relief that the
14 Commission’s own rules foreclose.

15 **II. Granting a Stay Would Constitute an Abuse of Discretion.**

16 Even if Commissioner Burns had identified some “extraordinary event” in his
17 motion, the question of whether to grant a stay would rest in the Commission’s sound
18 discretion. Here, exercising discretion to grant a stay would be tantamount to a
19 preliminary injunction indefinitely barring APS from changing its rates. At the very
20 least, Commissioner Burns should be required to meet the stringent equitable standard
21 that ordinarily applies to requests for such relief: “1) [a] strong likelihood that he will
22 succeed ... on the merits; 2) [t]he possibility of irreparable injury to him ... if the
23 requested relief is not granted; 3) [a] balance of hardships favor[ing] himself; and 4)
24 [p]ublic policy favor[ing] the injunction.” *Shoen v. Shoen*, 167 Ariz. 58, 63 (App.
25 1990). “The critical element in this analysis is the relative hardship to the parties.” *Id.*
26 Commissioner Burns has not demonstrated that a stay is warranted under these
27 traditional equitable criteria, and the evidence does not support one.
28

1 **A. Commissioner Burns Would Suffer No Irreparable Harm If the Rate**
2 **Case Proceeds.**

3 The Burns Motion to Stay does not identify any harm, irreparable or otherwise,
4 that Commissioner Burns will suffer if a stay is denied and the rate case is allowed to
5 continue. Commissioner Burns apparently is concerned that he may be called upon to
6 vote on the settlement agreement in the rate case without information that he
7 (erroneously) believes to be relevant. Mot. at 4. But that does not constitute any *harm*
8 to Commissioner Burns. If he determines that he lacks sufficient information to support
9 the settlement agreement, his remedy is simply to vote “no” and explain his reasons for
10 doing so.

11 Commissioner Burns also raises the specter of “legal rights violations, and
12 constitutional due process violations” that “will be fully manifested.” *Id.* at 2-3. But
13 Commissioner Burns’s alleged due process rights are not threatened in any way if the
14 rate case proceeds. Instead, he impermissibly asserts rights held by others. *Cf. Kerr v.*
15 *Killian*, 197 Ariz. 213, 217 (App. 2000) (holding that Department of Revenue lacked
16 standing to enforce due process rights of non-party taxpayers “because the right to due
17 process asserted does not belong to the Department,” and non-party taxpayers had fair
18 opportunity to defend their own rights); *Tonto Creek Estates Homeowners Ass’n v.*
19 *Ariz. Corp. Comm’n*, 177 Ariz. 49, 59-60 (App. 1993) (in appeal of Commission
20 decision, certificate transferee lacked standing to assert due process rights of original
21 certificate holder). A stay would prevent the Commission from doing the job assigned
22 to it by the Arizona Constitution, but it would not prevent any harm to Commissioner
23 Burns.

24 Moreover, any harm that Commissioner Burns alleges would never be
25 irreparable. If a party desires to appeal from the Commission’s decision in the rate
26 case, it can do so. A stay is not necessary to protect the rights of Commissioner Burns
27 or anyone else.
28

1 **B. A Stay Would Harm APS and Is Not in the Public Interest.**

2 On the other side of the equitable scale, there is no question that a stay of the rate
3 case would severely and irreparably harm APS. APS has not changed its base rates
4 since 2012, and, as its testimony in this proceeding shows, APS has made significant
5 investments on behalf of customers since that time. In this proceeding, APS seeks to
6 modify its rates so that the rates reflect the cost of these investments. Commissioner
7 Burns himself claims that the proposed rate increase is worth on average \$7 million per
8 month to APS—money reflecting investments that APS *has already made* to serve the
9 public. Mot. at 3. In fact, a stay would cause irreparable harm amounting to more than
10 \$7 million per month, because the stay would affect the summer months when APS's
11 revenues are highest. If a stay is imposed, the rule against retroactive ratemaking
12 would preclude APS from ever recovering this lost revenue, even if the Commission
13 approves a rate increase at some point in the future.

14 Moreover, Commissioner Burns seeks a stay of proceedings “until the matters
15 [he] raise[s] ... can be fully resolved.” *Id.* at 3. That could be *years* from now.
16 Commissioner Burns has already made clear that, if the Commission refuses to compel
17 compliance with his subpoenas, he will seek judicial review. *Id.* at 3 n.2. Thus,
18 Commissioner Burns's stay request asks the Commission to impose certain, tangible
19 harm on APS by staying the rate case for an indefinite period of time.

20 Staying these proceedings would not only harm APS, but would also harm the
21 public by delaying the substantial public benefits that will result from the settlement
22 agreement currently pending before the Administrative Law Judge. The proposed
23 settlement is signed by nearly 30 parties representing a diverse and universal range of
24 interests, including Commission Staff, residential customers through RUCO, merchant
25 generator representatives, large commercial and industrial customers, public schools,
26 federal agencies, low income advocates, union workers, retirees, and all five groups
27 representing solar interests. And even some of the parties who oppose the settlement
28 nevertheless agree that many of its aspects are in the public interest.

1 The public benefits that will result from the settlement agreement—and that
2 would be indefinitely delayed by the requested stay—include a rate stability provision,
3 under which APS would agree not to file a new general rate case before June 1, 2019; a
4 resolution of issues relating to solar distributed generation for the term of the settlement
5 agreement; new rate designs that give residential customers more choices for time-
6 differentiated rates; a customer education and outreach plan; continuation of crisis bill
7 assistance for low-income customers; a buy-through rate for large non-residential
8 customers; a moratorium on new self-build generation; an experimental pilot
9 technology rate for up to 10,000 customers; a program to expand access to utility-
10 owned rooftop solar for low and moderate income customers, schools, and rural
11 governments; discounts for schools and military customers; and the withdrawal of
12 appeals concerning the Commission’s Value and Cost of Solar decisions. APS Initial
13 Post-Hearing Br. 2-31, Docket No. E-01345A-16-0123 (May 17, 2017). The additional
14 charges that APS will collect will also enable further investments in rate base that will
15 be used and useful for APS customers. Unlike the alleged harm asserted by
16 Commissioner Burns, these harms are genuinely irreparable; customers who would
17 benefit from these aspects of the settlement will never be compensated for the loss of
18 those benefits during the period that Commissioner Burns’s lawsuits are pending and
19 the Commission is precluded from voting to approve the settlement and have it become
20 effective.

21 **C. Public Policy Does Not Favor a Stay.**

22 The Burns Motion to Stay does not contest that the settlement will carry concrete
23 benefits for the public, or offer any contrary concrete benefits that would result from a
24 stay. Rather, it claims that public policy requires staying these proceedings until the
25 subpoenas and disqualification issues are finally resolved because allowing the rate
26 case to proceed would “deepen public mistrust of the Commission and any individual
27 Commissioners who are already publicly suspected of unjustified abdication to APS
28 and Pinnacle West and self-interest.” *Id.* at 5. According to Commissioner Burns, it is

1 necessary for his motion to disqualify several of his colleagues to be resolved at the
2 threshold, and the subpoenas are necessary to that motion. Speculation regarding
3 perceptions, however, cannot outweigh the public policy favoring timely resolving a
4 pending rate case.

5 Indeed, even if Commissioner Burns's motions are successful, that would not
6 necessarily alter the outcome of this rate case. Even under a scenario where the
7 subpoenas are enforced, and documents regarding campaign contributions would be
8 produced, there is no basis to believe that these documents would reveal any
9 information or actions that could affect the settlement, which was negotiated by the
10 parties without the Commissioners' involvement. And there is no basis to believe that
11 the disclosure of the documents Commissioner Burns seeks would have any impact on
12 what a majority of the Commission may decide regarding whether the settlement is in
13 the public interest. Commissioner Burns may believe that his subpoenas advance the
14 purpose of justice in some abstract sense, but that does not outweigh the irreparable
15 harm that will result from a stay of the rate case.

16 In any event, the Commission should not grant a stay based on speculation that
17 delaying the rate case would somehow improve public trust in the Commission. First,
18 as described above, the rate case involves a proposed settlement supported by dozens of
19 parties representing the full range of interests before the Commission. No appearance
20 of impropriety could possibly result from Commission consideration and potential
21 approval of a settlement supported by Commission Staff and nearly every major interest
22 impacted by these proceedings.

23 Second, Commissioner Burns's argument concerning public policy assumes that
24 he is correct regarding the merits of his argument on disqualification. But for the
25 reasons described in APS's opposition to the motion to compel filed with the
26 Commission on this date, there would be no appearance of impropriety warranting
27 disqualification, even if the two Commissioners whose integrity Commissioner Burns
28

1 has questioned were the deciding votes. Thus, public policy does not support staying
2 these proceedings until the motion to compel can be resolved.

3 **D. Commissioner Burns Cannot Show a Likelihood on the Success of**
4 **His Motions.**

5 Because Commissioner Burns cannot show any potential for irreparable harm,
6 let alone that the balance of harms tips strongly in his favor, the Commission has ample
7 grounds to reject the request for a stay on this basis alone. Nevertheless, Commissioner
8 Burns fails to satisfy this equitable factor as well, for the reasons explained in APS's
9 opposition to the motion to compel. We incorporate that discussion by reference here.

10 **III. Conclusion**

11 For nine months, Commissioner Burns failed to follow the proper procedure to
12 compel compliance with his subpoenas, as the Superior Court has now ruled that he
13 should have done. Had he timely followed that procedure, the issues he raises could
14 have been resolved without any delay to these proceedings. The Commission should
15 not allow Commissioner Burns to turn his own failure to act into an "emergency"
16 warranting a stay, when doing so would cause significant harm to a public service
17 corporation in violation of Commission rules. The Commission should deny the stay
18 and consider the merits of the twenty nine-party settlement agreement, and the Hearing
19 Officer's recommendation when it is filed, within the timeframe established in
20 Commission rules.

21 DATED this 15th day of June, 2017.

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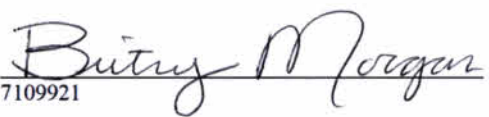
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